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The NLRB Election Process—Or, How NOT to Facilitate a Timely, Fair Vote

As of 2017, some 48% of workers without a union would vote to have one at their workplace—a 50% increase since this question was asked in a study conducted more than two decades ago.¹

So why don't more workers form unions at their workplaces—especially when labor law is supposed to “encourage the practice and procedure of collective bargaining?” Not be neutral, not discourage it, but encourage it?²

One of the biggest reasons is that the process for voting for union representation is skewed in the employer's favor and is riddled with bureaucracy and delay. Employers who want to defeat union organizing drives exploit the process to create roadblocks and frustrate workers' ability to vote in a timely manner. And, under current law, employers are allowed to legally lobby workers against forming a union—including in very coercive ways—from the moment a worker is hired. In addition, the employer actively can prohibit union representatives from talking with workers inside the workplace about the benefits of forming unions.

Even with these problems, tens of thousands of workers vote each year to join unions.³ More win union representation when their employers respect workers' choice and don't force workers to go through the formal election process.⁴

Respecting Workers' Choice—Hilton New Orleans Riverside

In 2017, the Hilton New Orleans Riverside hotel respected the decision of its housekeepers and food and beverage service workers to form a union with UNITE HERE. Hilton agreed to recognize and bargain with the workers' union after a neutral arbitrator verified that a majority of workers wanted the union. In 2018, Hilton and the union concluded negotiations for a collective bargaining agreement that includes substantial wage increases and protections against sexual harassment.

*We are very familiar with elections as a means of choosing our public representatives—mayor, senator, representative, governor. How does the union election process differ from the public election process in ways that are so problematic?*⁵

Lopsided Communications: Workers Hear Only One Side

Employers use their access to workers and control of the workplace to make sure workers understand the employer's views about unionization. Anti-union messages are included in orientation materials for new employees, and employers use company email to broadcast anti-union messages. Nine in 10 employers require employees to attend mandatory captive-audience meetings—meetings that employees must attend or else be disciplined or fired—with top management during work time to hear the employer's anti-union message.⁶ Two-thirds of employers require employees to meet one on one with their supervisors at least weekly during organizing campaigns.⁷ Well more than half of private employers (57%) threaten to close the worksite if employees unionize. Nearly half (47%) threaten to cut wages and benefits.⁸

Meanwhile, employers legally are allowed to keep union organizers out of the workplace so that organizers are unable to talk directly with employees on the job.⁹ As a result, workers are bombarded by the employer's message and deprived of the ability to hear from their union.

Case Study—Johns Hopkins University Fights Its Nurses

Nurses at The Johns Hopkins University in Baltimore are working to form a union to address staffing and other issues that affect patient care. Instead of respecting the nurses' wishes, Johns Hopkins—a major employer that receives millions of dollars in tax breaks and other public money—is spending millions of dollars and hiring third-party anti-union consultants to fight the nurses' organizing campaign. Nurses are required to attend hourlong anti-union meetings and are subjected to a barrage of anti-union emails. A nurse was fired for her advocacy. The National Labor Relations Board issued a comprehensive complaint against Johns Hopkins in January 2019, alleging that the employer's conduct violated federal labor law.

Hiring Union-Busters to Push Back on Workers' Power

Instead of leaving the decision of whether to form a union to their employees and respecting their choice, employers regularly hire third-party anti-union consultants, who craft and carry out communications and campaign plans to discourage workers from forming unions. Three out of every four employers hire third-party union-busters to help them with their campaigns, sometimes spending hundreds of thousands of dollars, or more.¹⁰ The anti-union consultant trade is a \$200-million-a-year industry, and the anti-union spending is closer to \$1 billion per year when indirect costs, such as the time spent by managers opposing unionization, are included.¹¹

Union-busters craft anti-union emails and make anti-union videos. They organize mandatory meetings where the employer or the union-buster delivers an anti-union message. And workers often are kept in the dark about who their employer is hiring and how much money the employer is spending on third-party union-busters. Public reports disclosing activities and expenditures only are filed months after the activity takes place, if then. A huge legal loophole allows employers and union-busters to avoid reporting completely if the union-buster stays in the background and avoids direct contact with workers.¹²

Case Study—XPO Logistics Drags Out the Bargaining Process

Since 2014, workers at XPO Logistics have been trying to form a union with the International Brotherhood of Teamsters. Workers at seven locations have voted for a union, but XPO has dragged out the bargaining process so there is not yet a collective bargaining agreement in place. Meanwhile, XPO has been charged by the National Labor Relations Board with multiple violations of labor law for threatening workers and other illegal conduct.¹³ Over the years, XPO has hired numerous third-party union-busters to fight its workers' organizing campaign, spending tens of thousands of dollars.

Firing Pro-Union Workers with No Real Consequences

In one out of every three campaigns, employers fire pro-union workers, because employers know this will frighten employees and undermine the organizing campaign.¹⁴ Some 15% to 20% of union organizers or activists can expect to be fired as a result of their activities in a union election campaign.¹⁵

Employers know that under current labor law, they will face no real consequences for illegally firing workers—just an order that they rehire the worker and give him or her the back wages they would have earned anyhow, minus the wages the worker earned, or could have earned, in the interim. In other words, firing union supporters is just a cost of doing business. The law does not provide for monetary penalties against employers for illegally firing pro-union workers, or damages to employees for the hardships they face when they are fired illegally.

In fiscal year 2018, employers were required to pay \$54 million to workers who were fired illegally for exercising their rights under our labor laws. Employers were ordered to reinstate more than 1,270 workers who were fired illegally for exercising their rights.¹⁶

Delays in the Election Process

Workers organizing to form a union collect petitions and authorization cards that co-workers sign stating they want union representation. Sometimes employers will respect workers' choice and recognize a union based on signatures from a majority of workers. But under current U.S. labor law, employers are not required to accept written proof of majority support, and can require workers to go through the formal election process at the National Labor Relations Board.

The process is started when workers or their union representative file a representation petition with the NLRB. The petition must be supported by signatures from at least 30% of workers in a designated group (the “bargaining unit”). The NLRB investigates the petition and eventually schedules an election in which workers vote on whether they want union representation.

When workers file a petition, employers exploit the law to drag out the scheduling of an election, and use the time between the petition and the election to campaign against the union. The NLRB adopted changes to its election procedures in 2015, and these changes have improved the process and reduced the amount of delay.¹⁷

The Trump majority on the NLRB has proposed to weaken or eliminate these improvements.¹⁸ Even with the changes, it still takes three to six weeks following a petition to hold an election, and sometimes much longer if the employer fights the election. In the meantime, the employer holds mandatory anti-union meetings and exploits its control of the workplace to campaign against the union. In contrast, in many provinces in Canada, elections occur much more quickly—in some cases within five days of a petition being filed—and the system works smoothly.¹⁹

Failure to Reach Agreement on a First Contract

When workers make it through this labyrinth and vote to form a union, employers drag their feet in bargaining over a collective agreement. More than half of all workers who vote to form a union still are without a collective bargaining agreement a year later.²⁰ Two years after an election, 37% of newly formed private-sector unions still have no labor agreement.²¹

In some cases, this is because employers slow-walk the bargaining process and fail to bargain in good faith. In other cases, employers take advantage of current labor law, which allows them to refuse to bargain if they are challenging an issue related to or arising out of the original election, like the composition of the bargaining unit. This process can take years, and in the meantime, the workers’ decision to form a union is thwarted. This creates a discouraging situation for workers and allows employers to foster a sense of futility in the process.

Employers' Anti-Union Tactics are Effective

A study of private-sector union organizing in Chicago found that while a majority of workers supported unionization when petitions were filed to begin the workplace organizing effort, unions were victorious in only 31% of these campaigns, after workers had endured the full range of employer anti-union activity.²²

Reforms are Needed

Workers want a collective voice on the job, as they are showing day after day by organizing, mobilizing and striking to win justice. But current law places too many obstacles in the way of workers who are trying to organize, and gives employers too much room to interfere with their workers' choice. The law needs to be substantially strengthened to make it more possible for workers to organize on a fair and timely basis, without interference or retaliation by their employers.

1 Thomas Kochan, William Kimball, Duanyi Yang and Erin L. Kelly, "Voice Gaps at Work, Options for Closing Them, and Challenges for Future Actions and Research," MIT Sloan School of Management, Institute for Work and Employment Research, working paper, June 2018.

2 29 USC 151.

3 In NLRB representation election cases that were closed in fiscal year 2018, more than 70,000 workers won union representation based on an analysis of NLRB election data, according to NLRB Case Activity Reports, accessed February 2019. Workers and their unions filed nearly 1,700 petitions for representation elections in FY 2018, according to National Labor Relations Board NLRB Case Activity Reports: Petitions and Elections, accessed February 2019.

4 This process is called majority signup, or card-check recognition. Employers recognize their employees' choice of union representation when workers present petitions, cards or other evidence showing that the union has the support of a majority of employees. See Adrienne Eaton and Jill Kriesky, "Union Organizing Under Neutrality and Card Check Agreements" ILR Review (October 2001). Majority signup is a well-known method for achieving union representation in Canada and other democracies, but many employers and their trade associations fight it in the United States. Several states require employers in the public sector to respect majority signup, but in the private sector, legislation requiring employers to respect majority signup has been blocked by employers and their trade associations.

5 For a comprehensive report on the NLRB election process and its shortcomings, see Gordon Lafer, "Neither Free Nor Fair: The Subversion of Democracy Under National Labor Relations Board Elections," American Rights at Work, July 2007.

6 Kate Bronfenbrenner, "No Holds Barred: The Intensification of Employer Opposition to Organizing," Economic Policy Institute, May 2009.

7 Bronfenbrenner, "No Holds Barred," at 3.

8 Bronfenbrenner, "No Holds Barred." See also Josh Bivens, et al., "How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy," Economic Policy Institute, August 2017.

9 *Lechmere, Inc. v. National Labor Relations Board*, 502 U.S. 527 (1992).

10 Bronfenbrenner, "No Holds Barred," at 3.

11 John Logan, "Consultants, Lawyers, and the 'Union Free' Movement," *Industrial Relations Journal* 33, 197 (2002).

12 The Obama administration issued a rule to provide more transparency on the use of union-busters, but the Trump administration rescinded that rule. See Marni von Wilpert, "By rescinding the persuader rule, Trump is once again siding with corporate interests over working people," Working Economics (Economic Policy Institute blog), June 13, 2017.

13 Lafe Solomon, "Report and Analysis of the NLRB Cases Against XPO," prepared for the International Brotherhood of Teamsters, September 2018.

14 Bronfenbrenner, "No Holds Barred," at 13.

15 John Schmitt and Ben Zipperer, "Dropping the Ax: Illegal Firings During Union Election Campaigns 1951–2007," Center for Economic and Policy Research, March 2009.

16 National Labor Relations Board, "NLRB Performance Reports Monetary Remedies," accessed February 2019; National Labor Relations Board, "NLRB Performance Reports Reinstatement Offers," accessed February 2019.

17 National Labor Relations Board, "NLRB Performance Reports Annual Review of Revised R-Case Rules," accessed February 2019. www.nlr.gov/news-outreach/news-story/annual-review-revised-r-case-rules.

18 Notice of Proposed Rulemaking (NPRM), Representation-Case Procedures, 82 Fed. Reg. 58783, Dec. 14, 2017.

19 "Ontario Labour Relations Board, Information Bulletin No. 1: Certification of Trade Unions," accessed February 2019; *Canadian Union of Pub. Emp. Local 79 v. Corp. of the City of Toronto*, 1996 OLRB Rep. July/August 552, para. 154.

20 David Madland and Karla Walter, "The Bottom Line in Labor Law Negotiations," Center for American Progress Action Fund, June 3, 2009.

21 Josh Bivens et al., "How today's unions help working people: Giving workers the power to improve their jobs and unrig the economy," Economic Policy Institute, August 2017.

22 Chirag Mehta and Nik Theodore, "Undermining the Right to Organize: Employer Behavior During Union Representation Campaigns," Center for Urban Economic Development at the University of Illinois at Chicago for American Rights at Work, December 2005.